

Introduced by Senator Nielsen

February 22, 2013

An act to amend Section 1170 of the Penal Code, relating to imprisonment.

LEGISLATIVE COUNSEL'S DIGEST

SB 708, as introduced, Nielsen. Imprisonment: sentences punishable in state prison.

Under existing law, certain specified felonies are punished by imprisonment in a county jail for 16 months, or 2 or 3 years or, where the term is specified, for the term described in the underlying offense. Notwithstanding these provisions, existing law requires that a sentence be served in state prison where the defendant has a prior or current conviction for a serious or violent felony, has a prior felony conviction in another jurisdiction that has all of the elements of a serious or violent felony, is required to register as a sex offender, or has an aggravated white collar crime enhancement imposed as part of the sentence.

This bill would additionally require a sentence to be served in state prison when the defendant is convicted of a felony and has 3 or more prior felony convictions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1170 of the Penal Code, as amended by
- 2 Section 2 of Chapter 828 of the Statutes of 2012, is amended to
- 3 read:

1 1170. (a) (1) The Legislature finds and declares that the
2 purpose of imprisonment for crime is punishment. This purpose
3 is best served by terms proportionate to the seriousness of the
4 offense with provision for uniformity in the sentences of offenders
5 committing the same offense under similar circumstances. The
6 Legislature further finds and declares that the elimination of
7 disparity and the provision of uniformity of sentences can best be
8 achieved by determinate sentences fixed by statute in proportion
9 to the seriousness of the offense as determined by the Legislature
10 to be imposed by the court with specified discretion.

11 (2) Notwithstanding paragraph (1), the Legislature further finds
12 and declares that programs should be available for inmates,
13 including, but not limited to, educational programs, that are
14 designed to prepare nonviolent felony offenders for successful
15 reentry into the community. The Legislature encourages the
16 development of policies and programs designed to educate and
17 rehabilitate nonviolent felony offenders. In implementing this
18 section, the Department of Corrections and Rehabilitation is
19 encouraged to give priority enrollment in programs to promote
20 successful return to the community to an inmate with a short
21 remaining term of commitment and a release date that would allow
22 him or her adequate time to complete the program.

23 (3) In any case in which the punishment prescribed by statute
24 for a person convicted of a public offense is a term of imprisonment
25 in the state prison of any specification of three time periods, the
26 court shall sentence the defendant to one of the terms of
27 imprisonment specified unless the convicted person is given any
28 other disposition provided by law, including a fine, jail, probation,
29 or the suspension of imposition or execution of sentence or is
30 sentenced pursuant to subdivision (b) of Section 1168 because he
31 or she had committed his or her crime prior to July 1, 1977. In
32 sentencing the convicted person, the court shall apply the
33 sentencing rules of the Judicial Council. The court, unless it
34 determines that there are circumstances in mitigation of the
35 punishment prescribed, shall also impose any other term that it is
36 required by law to impose as an additional term. Nothing in this
37 article shall affect any provision of law that imposes the death
38 penalty, that authorizes or restricts the granting of probation or
39 suspending the execution or imposition of sentence, or expressly
40 provides for imprisonment in the state prison for life, except as

1 provided in paragraph (2) of subdivision (d). In any case in which
2 the amount of preimprisonment credit under Section 2900.5 or any
3 other provision of law is equal to or exceeds any sentence imposed
4 pursuant to this chapter, the entire sentence shall be deemed to
5 have been served and the defendant shall not be actually delivered
6 to the custody of the secretary. The court shall advise the defendant
7 that he or she shall serve a period of parole and order the defendant
8 to report to the parole office closest to the defendant's last legal
9 residence, unless the in-custody credits equal the total sentence,
10 including both confinement time and the period of parole. The
11 sentence shall be deemed a separate prior prison term under Section
12 667.5, and a copy of the judgment and other necessary
13 documentation shall be forwarded to the secretary.

14 (b) When a judgment of imprisonment is to be imposed and the
15 statute specifies three possible terms, the court shall order
16 imposition of the middle term, unless there are circumstances in
17 aggravation or mitigation of the crime. At least four days prior to
18 the time set for imposition of judgment, either party or the victim,
19 or the family of the victim if the victim is deceased, may submit
20 a statement in aggravation or mitigation to dispute facts in the
21 record or the probation officer's report, or to present additional
22 facts. In determining whether there are circumstances that justify
23 imposition of the upper or lower term, the court may consider the
24 record in the case, the probation officer's report, other reports,
25 including reports received pursuant to Section 1203.03, and
26 statements in aggravation or mitigation submitted by the
27 prosecution, the defendant, or the victim, or the family of the victim
28 if the victim is deceased, and any further evidence introduced at
29 the sentencing hearing. The court shall set forth on the record the
30 facts and reasons for imposing the upper or lower term. The court
31 may not impose an upper term by using the fact of any
32 enhancement upon which sentence is imposed under any provision
33 of law. A term of imprisonment shall not be specified if imposition
34 of sentence is suspended.

35 (c) The court shall state the reasons for its sentence choice on
36 the record at the time of sentencing. The court shall also inform
37 the defendant that as part of the sentence after expiration of the
38 term he or she may be on parole for a period as provided in Section
39 3000.

(d) (1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(2) (A) (i) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing.

(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.

(B) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for

1 personal harm to victims prior to the offense for which the sentence
2 is being considered for recall.

3 (iii) The defendant committed the offense with at least one adult
4 codefendant.

5 (iv) The defendant has performed acts that tend to indicate
6 rehabilitation or the potential for rehabilitation, including, but not
7 limited to, availing himself or herself of rehabilitative, educational,
8 or vocational programs, if those programs have been available at
9 his or her classification level and facility, using self-study for
10 self-improvement, or showing evidence of remorse.

11 (C) If any of the information required in subparagraph (B) is
12 missing from the petition, or if proof of service on the prosecuting
13 agency is not provided, the court shall return the petition to the
14 defendant and advise the defendant that the matter cannot be
15 considered without the missing information.

16 (D) A reply to the petition, if any, shall be filed with the court
17 within 60 days of the date on which the prosecuting agency was
18 served with the petition, unless a continuance is granted for good
19 cause.

20 (E) If the court finds by a preponderance of the evidence that
21 the statements in the petition are true, the court shall hold a hearing
22 to consider whether to recall the sentence and commitment
23 previously ordered and to resentence the defendant in the same
24 manner as if the defendant had not previously been sentenced,
25 provided that the new sentence, if any, is not greater than the initial
26 sentence. Victims, or victim family members if the victim is
27 deceased, shall retain the rights to participate in the hearing.

28 (F) The factors that the court may consider when determining
29 whether to recall and resentence include, but are not limited to,
30 the following:

31 (i) The defendant was convicted pursuant to felony murder or
32 aiding and abetting murder provisions of law.

33 (ii) The defendant does not have juvenile felony adjudications
34 for assault or other felony crimes with a significant potential for
35 personal harm to victims prior to the offense for which the sentence
36 is being considered for recall.

37 (iii) The defendant committed the offense with at least one adult
38 codefendant.

39 (iv) Prior to the offense for which the sentence is being
40 considered for recall, the defendant had insufficient adult support

1 or supervision and had suffered from psychological or physical
2 trauma, or significant stress.

3 (v) The defendant suffers from cognitive limitations due to
4 mental illness, developmental disabilities, or other factors that did
5 not constitute a defense, but influenced the defendant's
6 involvement in the offense.

7 (vi) The defendant has performed acts that tend to indicate
8 rehabilitation or the potential for rehabilitation, including, but not
9 limited to, availing himself or herself of rehabilitative, educational,
10 or vocational programs, if those programs have been available at
11 his or her classification level and facility, using self-study for
12 self-improvement, or showing evidence of remorse.

13 (vii) The defendant has maintained family ties or connections
14 with others through letter writing, calls, or visits, or has eliminated
15 contact with individuals outside of prison who are currently
16 involved with crime.

17 (viii) The defendant has had no disciplinary actions for violent
18 activities in the last five years in which the defendant was
19 determined to be the aggressor.

20 (G) The court shall have the discretion to recall the sentence
21 and commitment previously ordered and to resentence the
22 defendant in the same manner as if the defendant had not
23 previously been sentenced, provided that the new sentence, if any,
24 is not greater than the initial sentence. The discretion of the court
25 shall be exercised in consideration of the criteria in subparagraph
26 (B). Victims, or victim family members if the victim is deceased,
27 shall be notified of the resentencing hearing and shall retain their
28 rights to participate in the hearing.

29 (H) If the sentence is not recalled, the defendant may submit
30 another petition for recall and resentencing to the sentencing court
31 when the defendant has been committed to the custody of the
32 department for at least 20 years. If recall and resentencing is not
33 granted under that petition, the defendant may file another petition
34 after having served 24 years. The final petition may be submitted,
35 and the response to that petition shall be determined, during the
36 25th year of the defendant's sentence.

37 (I) In addition to the criteria in subparagraph (F), the court may
38 consider any other criteria that the court deems relevant to its
39 decision, so long as the court identifies them on the record,

1 provides a statement of reasons for adopting them, and states why
2 the defendant does or does not satisfy the criteria.

3 (J) This subdivision shall have retroactive application.

4 (e) (1) Notwithstanding any other law and consistent with
5 paragraph (1) of subdivision (a), if the secretary or the Board of
6 Parole Hearings or both determine that a prisoner satisfies the
7 criteria set forth in paragraph (2), the secretary or the board may
8 recommend to the court that the prisoner's sentence be recalled.

9 (2) The court shall have the discretion to resentence or recall if
10 the court finds that the facts described in subparagraphs (A) and
11 (B) or subparagraphs (B) and (C) exist:

12 (A) The prisoner is terminally ill with an incurable condition
13 caused by an illness or disease that would produce death within
14 six months, as determined by a physician employed by the
15 department.

16 (B) The conditions under which the prisoner would be released
17 or receive treatment do not pose a threat to public safety.

18 (C) The prisoner is permanently medically incapacitated with
19 a medical condition that renders him or her permanently unable
20 to perform activities of basic daily living, and results in the prisoner
21 requiring 24-hour total care, including, but not limited to, coma,
22 persistent vegetative state, brain death, ventilator-dependency, loss
23 of control of muscular or neurological function, and that
24 incapacitation did not exist at the time of the original sentencing.

25 The Board of Parole Hearings shall make findings pursuant to
26 this subdivision before making a recommendation for resentence
27 or recall to the court. This subdivision does not apply to a prisoner
28 sentenced to death or a term of life without the possibility of parole.

29 (3) Within 10 days of receipt of a positive recommendation by
30 the secretary or the board, the court shall hold a hearing to consider
31 whether the prisoner's sentence should be recalled.

32 (4) Any physician employed by the department who determines
33 that a prisoner has six months or less to live shall notify the chief
34 medical officer of the prognosis. If the chief medical officer
35 concurs with the prognosis, he or she shall notify the warden.
36 Within 48 hours of receiving notification, the warden or the
37 warden's representative shall notify the prisoner of the recall and
38 resentencing procedures, and shall arrange for the prisoner to
39 designate a family member or other outside agent to be notified
40 as to the prisoner's medical condition and prognosis, and as to the

1 recall and resentencing procedures. If the inmate is deemed
2 mentally unfit, the warden or the warden's representative shall
3 contact the inmate's emergency contact and provide the information
4 described in paragraph (2).

5 (5) The warden or the warden's representative shall provide the
6 prisoner and his or her family member, agent, or emergency
7 contact, as described in paragraph (4), updated information
8 throughout the recall and resentencing process with regard to the
9 prisoner's medical condition and the status of the prisoner's recall
10 and resentencing proceedings.

11 (6) Notwithstanding any other provisions of this section, the
12 prisoner or his or her family member or designee may
13 independently request consideration for recall and resentencing
14 by contacting the chief medical officer at the prison or the
15 secretary. Upon receipt of the request, the chief medical officer
16 and the warden or the warden's representative shall follow the
17 procedures described in paragraph (4). If the secretary determines
18 that the prisoner satisfies the criteria set forth in paragraph (2), the
19 secretary or board may recommend to the court that the prisoner's
20 sentence be recalled. The secretary shall submit a recommendation
21 for release within 30 days in the case of inmates sentenced to
22 determinate terms and, in the case of inmates sentenced to
23 indeterminate terms, the secretary shall make a recommendation
24 to the Board of Parole Hearings with respect to the inmates who
25 have applied under this section. The board shall consider this
26 information and make an independent judgment pursuant to
27 paragraph (2) and make findings related thereto before rejecting
28 the request or making a recommendation to the court. This action
29 shall be taken at the next lawfully noticed board meeting.

30 (7) Any recommendation for recall submitted to the court by
31 the secretary or the Board of Parole Hearings shall include one or
32 more medical evaluations, a postrelease plan, and findings pursuant
33 to paragraph (2).

34 (8) If possible, the matter shall be heard before the same judge
35 of the court who sentenced the prisoner.

36 (9) If the court grants the recall and resentencing application,
37 the prisoner shall be released by the department within 48 hours
38 of receipt of the court's order, unless a longer time period is agreed
39 to by the inmate. At the time of release, the warden or the warden's
40 representative shall ensure that the prisoner has each of the

1 following in his or her possession: a discharge medical summary,
2 full medical records, state identification, parole medications, and
3 all property belonging to the prisoner. After discharge, any
4 additional records shall be sent to the prisoner's forwarding
5 address.

6 (10) The secretary shall issue a directive to medical and
7 correctional staff employed by the department that details the
8 guidelines and procedures for initiating a recall and resentencing
9 procedure. The directive shall clearly state that any prisoner who
10 is given a prognosis of six months or less to live is eligible for
11 recall and resentencing consideration, and that recall and
12 resentencing procedures shall be initiated upon that prognosis.

13 (f) Notwithstanding any other provision of this section, for
14 purposes of paragraph (3) of subdivision (h), ~~any~~ *an* allegation
15 that a defendant is eligible for state prison due to a prior or current
16 conviction *or convictions*, sentence enhancement, or because he
17 or she is required to register as a sex offender shall not be subject
18 to dismissal pursuant to Section 1385.

19 (g) A sentence to state prison for a determinate term for which
20 only one term is specified, is a sentence to state prison under this
21 section.

22 (h) (1) Except as provided in paragraph (3), a felony punishable
23 pursuant to this subdivision where the term is not specified in the
24 underlying offense shall be punishable by a term of imprisonment
25 in a county jail for 16 months, or two or three years.

26 (2) Except as provided in paragraph (3), a felony punishable
27 pursuant to this subdivision shall be punishable by imprisonment
28 in a county jail for the term described in the underlying offense.

29 (3) Notwithstanding paragraphs (1) and (2), where the defendant
30 (A) has a prior or current felony conviction for a serious felony
31 described in subdivision (c) of Section 1192.7 or a prior or current
32 conviction for a violent felony described in subdivision (c) of
33 Section 667.5, (B) has a prior felony conviction in another
34 jurisdiction for an offense that has all the elements of a serious
35 felony described in subdivision (c) of Section 1192.7 or a violent
36 felony described in subdivision (c) of Section 667.5, (C) is required
37 to register as a sex offender pursuant to Chapter 5.5 (commencing
38 with Section 290) of Title 9 of Part 1, ~~or~~ (D) is convicted of a crime
39 and as part of the sentence an enhancement pursuant to Section
40 186.11 is imposed, *or (E) is convicted of a felony and has three*

1 *or more felony convictions*, an executed sentence for a felony
2 punishable pursuant to this subdivision shall be served in state
3 prison.

4 (4) Nothing in this subdivision shall be construed to prevent
5 other dispositions authorized by law, including pretrial diversion,
6 deferred entry of judgment, or an order granting probation pursuant
7 to Section 1203.1.

8 (5) The court, when imposing a sentence pursuant to paragraph
9 (1) or (2) of this subdivision, may commit the defendant to county
10 jail as follows:

11 (A) For a full term in custody as determined in accordance with
12 the applicable sentencing law.

13 (B) (i) For a term as determined in accordance with the
14 applicable sentencing law, but suspend execution of a concluding
15 portion of the term selected in the court's discretion, during which
16 time the defendant shall be supervised by the county probation
17 officer in accordance with the terms, conditions, and procedures
18 generally applicable to persons placed on probation, for the
19 remaining unserved portion of the sentence imposed by the court.
20 The period of supervision shall be mandatory, and may not be
21 earlier terminated except by court order. Any proceeding to revoke
22 or modify mandatory supervision under this subparagraph shall
23 be conducted pursuant to either subdivisions (a) and (b) of Section
24 1203.2 or Section 1203.3. During the period when the defendant
25 is under such supervision, unless in actual custody related to the
26 sentence imposed by the court, the defendant shall be entitled to
27 only actual time credit against the term of imprisonment imposed
28 by the court. Any time period which is suspended because a person
29 has absconded shall not be credited toward the period of
30 supervision.

31 (ii) The portion of a defendant's sentenced term during which
32 time he or she is supervised by the county probation officer
33 pursuant to this subparagraph shall be known as mandatory
34 supervision.

35 (6) The sentencing changes made by the act that added this
36 subdivision shall be applied prospectively to any person sentenced
37 on or after October 1, 2011.

38 (i) This section shall become operative on January 1, 2014.

O